Supreme Court of Indiana.

STEIN v. HAUCK.

An easement in light and air, to be supplied to the ancient windows of one person from the premises of another, cannot be acquired in Indiana by mere use or prescription.

By the act of this state "touching easements" (1 R. S. 1876, p. 436), the legislature intended neither to recognise nor adopt the English rule in relation to easements in light and air, but to prevent the future acquisition of such easements, except in conformity with the provisions of such statute.

FROM the Dearborn Circuit Court. This was an action, brought by the appellee, to establish, by use, an easement in light, to be supplied to his ancient windows from the premises of the appellant. The complaint alleged such use, uinterruptedly, during twenty years, acquiesced in by the vendor of the appellant, and by the appellant after his purchase; and that after such use and acquiescence the appellant erected upon his own premises a frame structure, which effectively and permanently obstructed the light from the windows of the appellee. The sufficiency of the facts alleged in the complaint to maintain the action was questioned by a demurrer, which was overruled.

N. S. Givan and *W. H. Matthews*, for appellant.

J. Schwartz, for appellee.

The opinion of the court was delivered by

BIDDLE, J.—Exceptions were taken to the rejection of certain evidence; also, to the giving of certain instructions to the jury, and to the sufficiency of the evidence to sustain the verdict, upon all of which questions are presented for our decision; but the fundamental question in the case, which must be answered before the rights of the parties can be ultimately settled, continually recurs to us, namely, Can an easement in light and air, to be supplied to the ancient windows of one from the premises of another, be acquired by use or prescription in the state of Indiana? We therefore proceed at once to the examination of this question.

We read much in our books about the common-law right in England of an easement, acquired by use or prescription, in light or air coming to ancient windows from the premises of another; but when the history of the right is carefully studied, it will be found that it was sometimes disputed. It was denied in the case

of *Bury* v. *Pope*, 1 Cro. Eliz. 118, and, under the reign of Charles II., in the case of *Palmer* v. *Fletcher*, 1 Lev. 122. It was modified by the custom of London, and, indeed, was never indisputably settled until it was established by the statute of 3 Will. 4, c. 71, sec. 3. But, assuming that such an easement was a common-law right in England, before the statute of William IV., the question whether it is a common-law right in the state of Indiana has never before been directly presented to this court. In the case of *Keiper* v. *Klein*, 51 Ind. 316, the question was incidentally noticed; but that case turned upon the question whether a certain deed conveyed such an easement by implication, not whether it could be acquired by use or prescription. And it has been held, that the common law, as a system, is adopted in this state, except such parts of it as are inconsistent with our institutions or not suited to the condition of the country. In the case of *Robeson* v. *Pittenger*, 1 Green Ch. 57, it is held, that when ancient lights have existed for upwards of twenty years, undisturbed, the owner of an adjoining lot has no right to obstruct them; but this case was decided mainly on the authority of *Story* v. *Odin*, 12 Mass. 157, which has long ceased to be the law of Massachusetts; for in the case of *Randall* v. *Sanderson*, 111 Mass. 114, decided more than sixty years later, it is expressly held, that "it is the established law, in this Commonwealth, that an easement of light and air cannot be acquired by prescription," in support of which many cases are cited. In the case of *Durel* v. *Boisblanc*, 1 La. Ann. 407, where the easement of light to a window was coupled with the right of way through a passage, it was held that they could not be obstructed; but the decision was expressly placed upon the ground that these servitudes were visible and palpable, and, on examination of the property, the purchaser must have seen them, the court remarking that "could we believe that he was ignorant of them, a very different case would have been presented." In the case of *Gerber* v. *Grabel*, 16 Ill. 217, it is held that "twenty years' uninterrupted and unquestioned enjoyment of lights constitutes them ancient lights, in the enjoyment of which the owner will be protected." But CATON, J., in a separate opinion, evidently doubts the wisdom of the rule, and TREAT, C. J., dissented. These three cases are all the decisions we can find, and these three states—New Jersey, Louisiana and Illinois—the only states which have adopted the English rule concerning easements in light and

air, acquired by use or prescription, and the case in Illinois is the only one fully in accord with the English decisions, and is based upon a full adoption of the English common law by a statute of the state.

Against these decisions we have many American authorities. In *Napier* v. *Bulwinkle*, 5 Rich. 311, it is held that, "In the case of a window, which gives no cause of action to the owner of the space over which it looks, he is not bound to obstruct within twenty years to prevent the acquisition of a right; and without some other circumstance, from which his assent to the easement as a right may be inferred, his grant cannot be presumed from the mere unobstructed enjoyment." In *Parker* v. *Foote*, 19 Wend. 309, that eminent jurist, BRONSON, J., in delivering the opinion of the court, says: "There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England; and I see that it has recently been sanctioned with some qualification by an act of Parliament: Stat. 2 & 3 Will. 4, c. 71, sec. 3. But it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. * * * Nor do I find that it has been adopted in any of the states." This doctrine is fully approved in *Cherry* v. *Stein*, 11 Md. 1.

In Iowa, the English doctrine is held inapplicable: *Morrison* v. *Marquardt*, 7 Am. Law Reg. N. S. 336, s. c. 24 Iowa 35. In *Powell* v. *Sims*, 5 W. Va. 1, the English common law of ancient lights was disapproved. Ohio has decided that "An easement in light and air, to be supplied to one's windows from the premises of another, cannot be acquired * * * by use or prescription:" *Mullen* v. *Stricker*, 19 Ohio St. 135. See also *Banks* v. *The American Tract Society*, 4 Sandf. Ch. 438. We have already cited *Randall* v. *Sanderson*, 111 Mass. 114, which is supported by the following cases: *Fifty Associates* v. *Tudor*, 6 Gray 255; *Rogers* v. *Sawin*, 10 Id. 376; *Carrig* v. *Dee*, 14 Id. 583. Massachusetts has long since abrogated the English doctrine by statute. Mr. Washburn says: "The tendency of late years, in this country, has been against the doctrine of gaining a prescriptive right to the enjoyment of light and air, as an easement appurtenant to an estate, on the ground that it is incompatible with the condition of a country which is undergoing such radical and rapid changes in the progress of its growth:" 2 Washb. Real

Prop. 346; and he cites the states of New York, Massachusetts, South Corolina, Maine, Maryland, Alabama, Pennsylvania and Connecticut, as having discarded the English doctrine; to which list of states he might have added Ohio, Iowa and West Virginia, as we have seen by the authorities cited, *supra*. In several of the states, the question seems to be yet undecided.

It may not be unprofitable to reason a moment upon the propriety of following the current of American authorities upon this question, to which a few exceptional cases seem as but eddies. In the first place, an easement in light or air is unlike any other easement known to the law. It is neither an appurtenance nor a hereditament. No definition of property known to the law includes it specifically. No exclusive right can be had in light or air; legislation cannot create such a right, because man has no exclusive dominion over them. They are for all in common, "and upon whom doth not his light arise?" Job 25: 3. And "The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth:" St. John 3: 8. To give a right of property in light or air, which can control the right to the use of land, is to make the incident greater than the principal, and allow the shadow to control the substance.

Second, the owner of open space may not know, and cannot know of right, the internal arrangement of his neighbor's house; and may "stand by" while the invading claim, which is finally to embarrass, if not to destroy, the usefulness of his land, is gradually accruing against him, until it becomes a vested right, which he cannot dispute.

Third, if he knows that the right is accruing against him, he has no right of action against the person who enjoys his light or air, to prevent it, because he has not, and cannot have, any exclusive property in the light or air which occupies his space; he has nothing, therefore, to do, except to stand by and lose his rights, or erect his obstruction within a given time, simply for the purpose of protecting what was already his own. Besides,—

Fourth, the injury of such an easement to the land, which can be used only in the one place where it is, is so great, compared with the value of the easement in light or air, which can be had and used everywhere, that no such easement ought to be acquired by use or prescription, against one who may not know that it is accruing, or knowing it, can defend against it only by suffering

expense and inconvenience. The boundaries of the land are generally sufficient for the supply of its own light and air; and we do not see why the owner should be allowed to go beyond them to supply himself with these blessings, against the rights of another; or to throw that which was granted to him as a favor, into an injury to the grantor.

Upon these authorities, and for these reasons, we are prepared to hold, as the law of this state, that no one can acquire an easement in light or air, to be supplied from the premises of another, by mere use or prescription. We cannot see that this rule will work injury to any one; and we think it will place these impalpable and invisible claims upon a safe footing, consistent with the rights of all concerned. It is very easy to reserve such an easement to the vendor, or grant it to the vendee, in the deed which conveys the land, or to create it by any valid contract; then each one knows what he sells, and what he buys, and all persons are protected in their rights. Embarrassments have accumulated, and injuries have been suffered to property, growing out of the unsettled views upon this question. It should be put to rest. No one should stand in danger of unwittingly suffering burdens to be laid upon his property, nor be constantly compelled to guard against such an insidious invasion of his rights.

But the appellee insists that the state of Indiana has recognised, if not adopted, the English rule with regard to easements in light and air, acquired by use or presciption; that the allegations of fact in his complaint bring his case within the rule; that the evidence proves the facts to be true; and, therefore, that the judgment should be affirmed. The statute to which he refers is as follows:

"Sec. 1. That the right of way, air, light or other easement, from, in, upon, or over, the land of another, shall not be acquired by adverse use, unless such use shall have been continued uninterruptedly for twenty years:" 1 R. S. 1876, p. 436.

Sections second, third and fourth, provide means by which the owner of the land may prevent the acquisition of such an easement against him.

We do not concur with the views of the appellee, in reference to the construction of this statute; and instead of giving our own reasons for our conclusion, we have found a decision upon a statute similar to the one cited, indeed almost literally the same, which is so directly in point that we have adopted its language as our own.

"It is provided by statute c. 147, sec. 14, that 'no person shall acquire any right or privilege of way, air, or light, or any other easement, from, in, upon, or over the land of another by the adverse use or enjoyment thereof, unless such use shall have been continued uninterrupted for twenty years.' The following sections prescribe the mode, by which the acquisition of such rights may be prevented. It is obvious, that these enactments were not designed to create or give such rights, or to determine when or upon what terms they had already been acquired. These matters were left to be decided by the law as it previously existed. The design was to prevent their future acquisition without conformity to certain prescribed conditions. It does not even appear to have been intended to declare, that they would in future be acquired by virtue of the statute merely, but rather to prevent their acquisition without conformity to its provisions, leaving the decision to the previously existing law, whether any would be acquired:" *Pierre* v. *Fernald*, 26 Me. 436.

Doubtless our legislature, if it had intended to create such a right as is claimed by the complaint before us, or to declare that such a right already existed at common law, would have expressed itself in direct language to that effect; but, not having done so, we can give the statute no wider interpretation than its language warrants; and, as the right to the easement claimed did not exist in the state of Indiana by the common law, and has not been created by statute, it cannot be upheld. As to the principle of construing a statute which recognises a right, but does not expressly create it, see *Deutschman* v. *The Town of Charlestown*, 40 Ind. 449.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings.

Notwithstanding a few early American opinions to the contrary, it is now quite well settled in this country that no right to light and air is acquired laterally over the land of an adjoining proprietor, by mere use or prescription for any length of time. The short ground of the decisions being, 1st, that the making of a window in one's own building, on his own land, though looking out over the land of his neighbor, is no encroachment on his neighbor's rights, and cannot therefore be regarded as *adverse* to him; it lacks therefore one of the chief elements of a prescriptive right; 2d, that the English doctrine is not applicable to the state of things in this country, and would, if applied, work mischievous consequences in our cities and villages.

To Judge GOULD of Connecticut is apparently due the credit of having first

doubted, if not denied, that the English rule ought to be adopted in this country, and of suggesting that possibly the early English cases might be accounted for on the ground that in each case the window, claiming the right, overhung or projected over the adjoining estate, so that it constituted in and of itself an encroachment or encumbrance upon the adjoining property, and thus by twenty years' existence acquired the right to continue. But this fact, if so, might give the right to continue the window or overhanging structure in its place, but would not therefore necessarily establish the right to look out over the neighboring land. The right of the window *to be* might be thus acquired, but not for persons to enjoy the prospect out of it.

In 1838 this question, having been indirectly admitted in *Mahan* v. *Brown*, 13 Wendell 263, directly arose in the Supreme Court of New York, in *Parker* v. *Foote*, 19 Wendell 308; an action on the case for obstructing the light to the plaintiff's house, which he had erected twenty-four years before upon a lot of land he had bought of the defendant himself, who had after that lapse of time erected a building on his remaining lot, and thus obstructed the light to the plaintiff's window. The plaintiff's claim was not admitted, and as this may be called the leading case in America, on this side of the question, we give the following extract from the opinion of BRONSON, J. In answer to the argument derived from other instances of easements acquired by use or prescription, he says:—

"As neither light, air nor prospect can be the subject of a *grant*, the proper presumption, if any, to be made in this case is, that there was some *covenant* or *agreement* not to obstruct the lights: *Cross* v. *Lewis*, 2 B. & C. 628, per BAYLEY, J.; *Moore* v. *Rawson*, 3 Id. 332, per LITTLEDALE, J. But this is a matter of little moment. Where it is proper to indulge any presumption for the purpose of quieting possession, the jury may be instructed to make such an one as the nature of the case requires: *Eldridge* v. *Knott*, Cowp. 214.

"Most of the cases on the subject we have been considering relate to *ways*, *commons*, *markets*, *watercourses*, and the like, where the user or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made. His property has either been invaded, or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of *windows* overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy; and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window: *Chandler* v. *Thompson*, 3 Camp. 80; *Cross* v. *Lewis*, 2 B. & C. 686, per BAYLEY, J. Upon what principle the courts in *England* have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another, under a claim of right to pass over, or feed his cattle upon it, or divert the water from his mill, or throw it back upon his land or machinery, in these and the like cases, long-continued acquiescence affords strong presumptive evidence of right. But in the case of lights, there is no *adverse user*, nor indeed any use whatever of another's property, and no foundation is laid for indulging any presumption against the rightful owner.

"Although I am not prepared to adopt the suggestion of GOULD, J., in *Ingraham* v. *Hutchinson*, 2 Conn. 597, that the lights which are protected may be such as *project* over the land of the

adjoining proprietor; yet it is not impossible that there are some considerations connected with the subject which do not distinctly appear in the reported cases. See *Knight* v. *Halsey*, 2 Bos. & P. 206, per ROOKE, J.; 1 Phil. Ev. 125.

"The learned judges who have laid down this doctrine have not told us upon what principle or analogy in the law it can be maintained. They tell us that a man may build at the extremity of his own land, and that he may *lawfully* have windows looking out upon the lands of his neighbor: 2 B. & C. 686; 3 Id. 332. The reason why he may lawfully have such windows must be because he does his neighbor no wrong; and indeed so it is adjudged, as we have already seen; and yet, somehow or other, by the exercise of a lawful right in his own land for twenty years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of his fee, with the privilege of paying taxes and assessments, but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner remains to be settled: 2 B. & C. 686; 2 Car. & P. 465; 5 Id. 438. Now what is the acquiescence which concludes the owner? No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a *lawful* right on the part of his neighbor. How then has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall twenty or fifty feet high, as the case may be—not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although done on one's own land, is calculated to render a man odious. Indeed, an attempt has been made to sustain an action for erecting such a wall: *Mahan* v. *Brown*, 13 Wend. 261. There is, I think, no principle upon which the modern *English* doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in *England;* and I see that it has recently been sanctioned with some qualification by an Act of Parliament: Stat. 2 & 3 Will. 4, c. 71, s. 3. But it cannot be applied in the growing cities and villages of this country without working the most mischievous consequences. It has never, I think, been deemed a part of our law: 3 Kent's Com. 446, note [a].

"Nor do I find that it has been adopted in any of the states. The case of *Story* v. *Odin*, 12 Mass. 157, proceeds on an entirely different principle. It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law. And besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April 1775: Const. N. Y., art. 7, § 13. There were two Nisi Prius decisions at an earlier day (*Lewis* v. *Price*, in 1761, and *Dongal* v. *Wilson*, in 1763), but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin* v. *Upton* was decided by the K. B.: 2 Saund. 175, note [2]. This was clearly a departure from the old law: *Bury* v. *Pope*, Cro. Eliz. 118."

This decision has often been approved in New York, and may be considered the settled law of that state. See *Myers* v. *Gemmel*, 10 Barb. 537 (1851); *Doyle* v. *Lloyd*, 54 N. Y. 439 (1875).

In 1847, the Supreme Court of Maine, in *Pierre* v. *Fernall*, 26 Me. 436, in well expressed language thus stated the objections to the English rule:—

"Nothing in the law can be more certain than one's right to occupy and use his own land as he pleases, if he does not thereby injure others. He may build upon it, or occupy it as a garden,

grass-plat or passage way, without any loss or diminution of his rights. No other person can acquire any right or interest in it, merely on account of the manner in which it has been occupied. When one builds upon his own land immediately adjoining the land of another person and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right. This is admitted : *Cross* v. *Lewis*, 2 B. & C. 686. By the exercise of a legal right he can make no encroachment upon the rights of his neighbor, and cannot thereby impose any servitude or acquire any easement by the exercise of such a right for any length of time. He does no injury to his neighbor by the enjoyment of the flow of light and air, and does not, therefore, claim or exercise any right adversely to the rights of his neighbor. Nor is there anything of similitude between the exercise of such a right and the exercise of rights claimed adversely. It is admitted in the case supposed that no adjoining landowner can obtain redress by any legal process. In other words, that his rights have not been encroached upon ; and that he has no cause of complaint. And yet, while thus situated for more than twenty years, he loses his right to the free use of his land, because he did not prevent his neighbor from enjoying that which occasioned him no injury and afforded him no just cause of complaint. The result of the doctrine is, that the owner of land not covered by buildings, but used for any other purpose, may be deprived of the right to build upon it by the lawful acts of the owner of the adjoining land performed upon his own land and continued for twenty years.

"It may be sarely affirmed that the common law contained no such principle. The doctrine as stated in the more recent decisions appears to have arisen out of the misapplication in England of the principle, by which rights and easements are acquired by the adverse claim and enjoyment of them for twenty years, to a case in which no adverse or injurious claim was either made or enjoyed."

The courts of Pennsylvania also deny the application of the English doctrine to our situation: *Hoy* v. *Sterrett*, 2 Watts 381 (1833) ; *Wheatley* v. *Bough*, 25 Penna. St. 532 (1855) ; more emphatically repeated in *Haverstick* v. *Sipe*, 33 Id. 568 (1859).

In South Carolina, it was long thought that the English rule was sanctioned by the language used in *McCready* v. *Thomson*, Dudley 131 (1838), but upon full consideration of the arguments and authorities the opposite view was subsequently taken and fully adopted by the Court of Appeals, although the use had continued over fifty years : *Napier* v. *Bulwinkle*, 5 Rich. 311 (1852).

Massachusetts has fully adopted the same doctrine. It was first suggested by counsel in that state in *Atkins* v. *Chilson*, 7 Metc. 402 (1844), but it became unnecessary to decide it, and again in *Fifty Associates* v. *Tudor*, 6 Gray 259 (1856), but subsequently it was fully approved and followed in *Rogers* v. *Sawin*, 10 Gray 376 (1858) ; in *Carrig* v. *Dee*, 14 Id. 583 (1860) ; and in many other cases since : *Richardson* v. *Pond*, 15 Gray 387 (1860) ; *Paine* v. *Boston*, 4 Allen 169 (1862) ; *Randall* v. *Sanderson*, 111 Mass. 119 (1872), quite overruling any earlier dicta to the contrary. And it was held immaterial that the sill of the overlooking window projected over the boundary line so as to overhang the neighbor's land, or that the window itself would swing outward over the same.

In Maryland, also, notwithstanding the dictum to the contrary in *Wright* v. *Freeman*, 5 H. & J. 477, the English rule is now entirely repudiated : *Smith* v. *White*, and *Cherry* v. *Stein*, 11 Md. 23 (1858).

It is true, the Maryland courts still hold that such a right may be acquired by an implied grant arising from a deed

of one lot by the proprietor of both: *Janes* v. *Jenkins*, 7 Am. Law Reg. N. S. 24, s. c. 34 Md. 1 (1871), but even this is against the current of American decisions: *Keats* v. *Hugo*, 115 Mass. 216 (1874).

Vermont, also, in 1860, fully endorsed and directly applied the American rule above laid down: *Hubbard* v. *Town*, 33 Vt. 295, the court saying: "We think the English courts, in applying the doctrine of the presumption of grants from long use and acquiescence to this class of cases, clearly departed from the ancient common-law rule as laid down in *Bury* v. *Pope*, Cro. Eliz. 118, and the error, as it seems to us, consists in placing cases like the present upon the same footing and making them subject to the same rules that govern another class of cases, to which they really have no analogy. In *Lewis* v. *Price*, WILMOT, J., said "that when a house had been built forty years and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as where these have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties, and that twenty years was sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to an easement belonging to the house.' As we have already seen, no presumption of an agreement arises, as none was necessary to justify the act. The man who occupies his own house for twenty years has no better title to it at the end of that time than he had in the outset. Does he acquire any greater right to the light by the occupation than to the house? Clearly not; having usurped no right he can acquire none by lapse of time. The error in the reasoning is, in saying that because the man who takes possession of his neighbor's house and holds it adversely for twenty years (his neighbor acquiescing therein), acquires a title to it, therefore the man who opens windows in his own house, that in no way interfere with the rights of his neighbor, and of which such neighbor has no legal right to complain, and keeps them open for twenty years, thereby acquires a right to insist that no act shall be done by his neighbor on his own land that in any respect interferes with or obstructs the light to those windows. In the one case there is an infringement of the rights of another for which the law gives a remedy by action; in the other there is not. This constitutes a radical difference between the two cases, and that, too, in respect to the very point upon which the whole doctrine of presumption in cases like those under consideration depends."

The same year the Supreme Court of Ohio approved this doctrine in *Hicatt* v. *Morris*, 10 Ohio St. 530 (1860), and repeated the same in *Mullen* v. *Stricker*, 19 Ohio St. 142 (1869). Texas followed the same way in *Klein* v. *Gehrung*, 25 Tex. 238 (1860); and the next year Alabama also fully endorsed the same rule in *Ward* v. *Neal*, 37 Ala. 500 (1861); and West Virginia is also on the same side: *Powell* v. *Sims*, 5 West Va. 1 (1871); and now Indiana, in our principal case, has added the weight of a well-considered judgment in support of the same view.

Morrison v. *Marquardt*, 24 Iowa 35 (1867), sometimes cited on the same side, seems to have been decided rather against the doctrine of an implied grant of a right to light and air from a conveyance of the estate to which it is claimed as appurtenant; a very different question, but one, however, which the main current of authorities in America decide the same way as when a right is claimed merely by long use.

In opposition to this long array of express adjudication, what support has the English rule in our courts? The doctrine of a prescriptive right from

long use merely does seem to have been approved in New Jersey in *Robeson* v. *Pittenger*, 1 Green Ch. 57 (1838), but there was an additional important fact in that case, that the two adjoining lots had been both owned by the same party, and after the plaintiff's building had been erected on one, he had sold the defendant's lot to other parties, from which an implied grant, or reservation rather, has been sometimes deduced of a right to continue the lights as before. Whether there is or is not a sufficient foundation for such a claim, in the absence of express words to that effect, may well be doubted, but the claim rests on a very different basis from that of a mere presumptive adverse user. The same observation applies still more strongly to the case of *Dusel* v. *Boisblanc*, 1 La. Ann. 407 (1846).

In *Manier* v. *Myers*, 4 B. Monr. 520 (1844), Judge MARSHALL, of Kentucky, did quote approvingly, by way of illustration in a certain case, the English rule, but we do not find any express decision in that state upon the question; and Judge STORY, in *United States* v. *Appleton*, 1 Sumn. 402, apparently approves the doctrine.

In *Gerber* v. *Grabel*, 16 Ill. 217 (1854), the marginal notes would indicate that the English rule was approved, and the case is often so cited, but a careful examination of the case shows that this was not necessarily the point of the decision. The action was for wrongfully obstructing the plaintiff's light, but the declaration did not allege on *what ground* the plaintiff claimed the right, whether by presumption, express grant, or implied grant, and judgment below having been arrested, on a verdict for the plaintiff, this decision was reversed and judgment on the verdict, because, said the court, "the plaintiff might have proved a prescription under our common law, as we have laid it down, or he might have proved an express grant; or he might have proved circumstances from which a grant or estoppel would be presumed without regard to length of use. We must presume the proofs warranted the verdict, and there is nothing in the verdict contrary to law." But Judge SCATES had already said, after stating the English rule, "But such is not the rule of the common law of Illinois, as I shall proceed to show;" and he continues, "while we highly respect the learned decisions of English courts adopting an analogous rule to their statute of limitations, we must bow to the authority of these older rulings (which he had before cited as not supporting the doctrine of prescription), with liberty to say that a twenty years' prescription for the easement of light and air is not applicable to the circumstances of this state, unsettled and unimproved as it is;" and he cites with approbation *Parker* v. *Foote*, 19 Wend. 309, and other cases on the same side. We do not, therefore, understand Illinois to be in favor of the English rule. Precisely the same view was taken in *Ward* v. *Neal*, 35 Ala. 602 (1860), viz., that a general averment of the right to light might be good *as a matter of pleading*, upon demurrer, since under that allegation the right might be proved to have arisen from express grant, as well as by prescription. But when the case came again before the court upon the facts, setting up an adverse user merely, the English rule was expressly denied and the American adopted: 37 Ala. 500 (1861). And nothing in *Ray* v. *Lynes*, 10 Ala. 63 (1846), sanctions a different opinion, though it is sometimes cited as doing so.

In view of the course of our decisions on this question, we think it may be reasonably concluded that, *notwithstanding some early opinions to the contrary, it cannot now be safely asserted that the doctrine of a right to light and air by a mere prescriptive use prevails at present in a single American state.*

EDMUND H. BENNETT.